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Judicial Archaeology: The Ninth Circuit Opinions of Justice Kennedy

Marsha Berzon The Honorable

Essays

Judicial Archaeology: The Ninth Circuit Opinions of Justice Kennedy

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In preparation for this panel, I watched a tape of an interview with Justice Kennedy I participated in at a Ninth Circuit conference some years ago. Justice Kennedy made a revealing observation. He said, "I was in high school when *Brown v. Board of Education*[1] came out. I thought to myself, that's the end of prejudice and bias and we can now go on."[2] Justice Kennedy continued: "I thought to myself, my sister knows this because she will either be a secretary or a nurse."[3] What he was saying, of course, was he didn't see *that* discrimination—the stereotyping of women—at the time. His next sentence was, "The hardest thing to understand is the present."[4]

I empathize with that sentiment. People grow up in the context that they grow up in, with its cultural presumptions and blindness to the possibility of varying those presumptions. As Justice Kennedy's comment suggests, there is sometimes a problem seeing what's around you when you've grown up in a closed box; the box itself is not visible. The ability to perceive the present's restrictions at least dimly and to sense what's coming next—or at least that something different from the present may be coming next—is a character strength.

To build on that theme, what I want to do today is a sort of archaeology. I want to look at some of Justice (then Judge) Kennedy's Ninth Circuit opinions, see the degree to which they presage—or don't—what he did on the Supreme Court, and perhaps draw a few lessons about these trajectories—about how

[†] Judge, United States Court of Appeals for the Ninth Circuit. Thank you to the editors of the *Hastings Law Journal* for helping me to uncover the Ninth Circuit opinions that I discuss, in particular Kelsey Constantin, Andrew Klair, Austin Shopbell, and Nina Gliozzo.

1. 347 U.S. 483 (1954).

2. U.S. Court of Appeals for the Ninth Circuit, *Conversation with the Justice*, YOUTUBE (Aug. 30, 2012), https://www.youtube.com/watch?v=0g_T6ZPbHUU.

3. *Id.*

4. *Id.*

people grow through time or, instead, how they continue to reiterate what they've done the first time.

I am also going to venture a brief comment on a case of Justice Kennedy's that no one has mentioned, *Martinez v. Ryan*.[5] Federal judges are spending an inordinate amount of time right now with this case, which concerns when federal prisoners can bring habeas cases regarding ineffective assistance of counsel.[6] *Martinez* is on my mind because I heard three capital appeals this month. Much of the time in arguments and post-argument conferences in those hearings was taken up with asking, "What did Justice Kennedy mean in *Martinez v. Ryan*?" *Martinez* was a fairly creative opinion, one that I think also says something about what Justice Kennedy's priorities were in criminal justice jurisprudence.

So to begin: the title of this symposium refers to Justice Kennedy's "Four Decades of Influence." Thirteen years of those four decades were spent on the Ninth Circuit, 30 years were spent on the Supreme Court.

There are obvious differences in the roles of Court of Appeal Judges and Supreme Court Justices. The mix of cases is very different. The ability to concentrate on the important ones is somewhat different. The degree of public attention is obviously inordinately different. And the ultimate direct impact on national legal doctrine is different. But, as I'm going to suggest, there is significant indirect national impact of Court of Appeals opinions, including that what is written in those opinions often later shows up in the Supreme Court as the law of the land. And the Ninth Circuit decides the vast majority of its cases without any Supreme Court intervention, so we're responsible for developing legal doctrine unless and until the Supreme Court steps in.

This Court of Appeals realm is the one in which Justice Kennedy was operating for thirteen years. (I did not overlap with him in the court, either as a law clerk—as he came on our court right after I finished clerking—or as a judge on the Ninth Circuit. I did get to know him somewhat later though, through Ninth Circuit conferences primarily.)

The first case I am going to talk about is *United States v. Finch*,[7] decided in 1976, right after Justice Kennedy began his stint on the Ninth Circuit. *Finch* held that there was no double jeopardy in retrying a defendant where the defendant entered into stipulated facts, the district court made a legal decision, and the government appealed.[8] The theory was that since the district court's ruling was simply a legal decision, the government could appeal.

Finch is interesting to me, but probably was not terribly pleasing to then-Judge Kennedy, because it was summarily reversed by the Supreme Court without an argument, in a one paragraph disposition issued very soon after the

5. 566 U.S. 1 (2012).
6. *Id.* at 9–15.
7. 548 F.2d 822 (9th Cir. 1976).
8. *Id*. at 827.

Ninth Circuit decision.[9] It must have been a bit discouraging to a new judge to have his handiwork disapproved of so disrespectfully. What's interesting to me about the swift rejection of *Finch* is that the practice of summary reversals without argument has become fairly usual in the current Court. There are six or seven or eight of them a year. I wrote an opinion once explaining that summary reversals are a poor idea, because they are decided not only without argument but without briefing, and can reflect a limited understanding of the case as a whole.[10] Certiorari petitions are not supposed to address the merits, but instead, whether or not the case deserves review by the Supreme Court. So, when reversing summarily, the Court may not know very much about the nuances of the facts and legal issues. It may well be that Justice Kennedy felt at the time of *Finch* that there was more to the case than the Supreme Court recognized. But as far as I know, he participated as a Supreme Court Justice in these summary reversals without complaining about them, even though he was a "victim" of the practice at the outset of his judicial career.

The other thing that's interesting about *Finch* is that the rest of the opinion—after the double jeopardy discussion—has a lengthy historical analysis about fishing rights on the Crow reservation.[11] Because Justice Kennedy decided there wasn't double jeopardy and the case was appealable, he reached the merits. Of course, the merits part of the *Finch* opinion was vacated, so it has never been controlling. I read one comment by an Indian rights litigator who said that had that opinion stood, Justice Kennedy would have been known as one of the great champions of Indian treaty rights.[12] As it turned out, the Supreme Court later, in *Montana v. United States*, took a contrary view to Kennedy's decision in *Finch*.[13] Interestingly, just at the end of his tenure, Justice Kennedy recused in *Washington v. United States*,[14] which was also about Indian fishing rights, because, digging back, he discovered that he had been on an earlier version of the case in the Ninth Circuit. So Indian fishing rights issues never went away during Justice Kennedy's 40-year tenure.

Finch also shows that some of the hardest work we do as judges ends up not having the influence it might because of fortuitous circumstances—here, the fact that there was a constitutional barrier to reaching the merits in the case, according to the Supreme Court.[15]

The next case I am going to discuss was decided in 1979, *Spain v. Procunier*.[16] (I am proceeding roughly chronologically.) *Spain* was a very well-

9. *See* Finch v. United States, 433 U.S. 676, 677 (1977).

10. Visciotti v. Martel, 862 F.3d 749, 772, 774 (9th Cir. 2016) (Berzon, J., concurring).

11. *Finch*, 548 F.2d at 827–35.

12. Matthew L.M. Fletcher, *Reflections on Justice Kennedy's Indian Law Legacy*, TURTLE TALK (June 29, 2018), https://turtletalk.blog/2018/06/29/reflections-on-justice-kennedys-indian-law-legacy/.

13. *See* Montana v. United States, 450 U.S. 544, 554–55 (1981).

14. 138 S. Ct. 1832 (2018).

15. Finch v. United States, 433 U.S. 676, 677 (1977).

16. 600 F.2d 189 (9th Cir. 1979).

known case, at least in California. Justice Kennedy began the opinion by saying that this case "is difficult because it requires us to pass upon measures adopted by prison officials for the safe custody of some of the most dangerous men in the prison population."[17] There was a great deal of unrest in the California prison population during that time, much of it with a political tinge. Johnny Spain and some other participating prisoners were placed in solitary confinement, shackled severely everywhere they went, routinely subjected to tear gas, and denied any outdoor exercise.[18]

Spain was an early Eighth Amendment prison conditions case, one that to my mind ties directly to Justice Kennedy's later interest in prison conditions—most obviously, his opinion in *Brown v. Plata*, approving a broad injunction designed to improve medical care in the California prison system.[19] But there is also, along the same lines, Justice Kennedy's quite extraordinary concurrence in *Davis v. Ayala*.[20] He wrote a somewhat out-of-the-box concurrence explaining, in a case deciding only procedural issues, that solitary confinement was a harsh and disturbing practice, and inviting litigation on its constitutionality.[21]

Spain v. Procunier seems to me to be the incubator for this set of concerns. Justice Kennedy said in *Spain* that "[u]nderlying the eighth amendment is a fundamental premise that prisoners are not to be treated as less than human beings."[22] That refrain ties into a notion somewhere at the core of Justice Kennedy's jurisprudence, and perhaps his worldview—the sense of everyone's humanity, whatever the scope of each person's legal protections may be.

Also, in *Spain*, Justice Kennedy was very aware that the court's judgment should be informed by current, enlightened scientific opinions as to the conditions necessary to ensure the physical and mental health of prisoners. I think that's another refrain—an interest in expertise in what non-lawyers and non-judges are saying about things.[23] The opinion was a very careful exegesis, going through each of the restraints, approving some of them and disapproving others, in a way fairly unusual for the time—especially given the high profile media attention to and fear of the California prison uprisings during that period.

Then we have *Flores v. Pierce*.[24] Although I had never heard of this opinion, I found it quite interesting to read—again, particularly in light of Justice Kennedy's later Supreme Court opinions. *Flores* concerned a denial of business restaurant licenses in Calistoga, a city in the California wine country, to two

17. 600 F.2d at 192.

18. *Id.* at 192, 196, 199.

19. 563 U.S. 493, 502 (2011).

20. 135 S. Ct. 2187, 2208 (2015) (Kennedy, J., concurring).

21. *Id.* at 2209–2210.

22. *Spain*, 600 F.2d at 200.

23. *See id.* ("It follows that when confronting the question whether penal confinement in all its dimensions is consistent with the constitutional rule, the court's judgment must be informed by current and enlightened scientific opinion as to the conditions necessary to insure good physical and mental health for prisoners.").

24. 617 F.2d 1386 (9th Cir. 1980).

businesses, one owned by a Hispanic and one not, but both of which had largely Hispanic clientele.[25] In both instances, the local police protested the issuance of business licenses to these individuals to run restaurants and bars.[26] The question in *Flores* was whether the license denials were unconstitutional because they were based on race.[27]

The decision had a quite careful and interesting approach to how one finds discriminatory intent. *Flores* was decided after *Washington v. Davis*[28] and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[29] so a disparate impact Equal Protection theory was not available. Instead, the plaintiffs had to prove discriminatory animus. Justice Kennedy emphasized as critically important the fact that these were the only two licenses that had been protested—that is, the disparate impact was of enormous relevance in proving intent, even if not controlling.[30] He also emphasized that the defendant city officials "deviated from previous procedural patterns" in denying these business licenses.[31]

I also thought it interesting, in light of *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Commission*[32] that in *Flores*, Justice Kennedy saw evidence of pretext or animus in the city officials' statements that their concerns were with "the desirability of the applicant" and keeping the town on a "good level."[33] He read those statements, quite sensitively, as indicating that the race or ethnicity of the applicants was relevant to whether they would be issued a business license.[34] In *Masterpiece Cakeshop*, Justice Kennedy similarly attributed a discriminatory motive, in that case against religion, from the statements of adjudicators as to why they were deciding as they were.[35] I also wondered a bit how *Flores* dovetailed with the Supreme Court travel ban case *Trump v. Hawaii*.[36] Justice Kennedy's sensitivity to motive was perhaps less apparent in the Trump case, although the immigration context may explain the difference.[37]

25. *Id.* at 1388.

26. *Id.*

27. *Id.*

28. 426 U.S. 229 (1976) (rejecting a disparate impact Equal Protection claim and holding that a showing of intentional discrimination is required for claims of discrimination under the Equal Protection clause).

29. 429 U.S. 252, 265–66 (1977) (same).

30. *Id.* at 1390.

31. *Id.* at 1389.

32. 138 S. Ct. 1719 (2018).

33. *Flores*, 617 F.2d at 1390 (internal quotation marks omitted).

34. *Id*. ("[T]he jury may well have concluded . . . that the explanations given by the defendants for their actions were simply pretexts to conceal an intent to act upon stereotypic classifications which resulted from a racial animus.").

35. 138 S. Ct. at 1731–32.

36. 138 S. Ct. 2392 (2018).

37. *Id.* at 2424 (Kennedy, J., concurring).

Next, and really fascinating, is *Beller v. Middendorf*,[38] decided in 1980. *Beller*, in which Justice Kennedy wrote the opinion, upheld the Navy's policy precluding gays from serving in the Navy.[39] Matt Coles, who is here, was a lawyer in *Beller*; he told me at lunch today that despite that holding, *Beller* was regarded by the LGBT legal community as a somewhat hopeful opinion. *Beller* does have passages where glimmers of Justice Kennedy's later views in *Romer v. Evans*,[40] *Lawrence v. Texas*,[41] *United States v. Windsor*,[42] and *Obergefell v. Hodges*[43] with regard to LGBT rights come through.

Justice Kennedy began the substantive part of *Beller* thus: "We recognize that to many persons the regulations may seem unwise."[44] Perhaps at that time, in 1980, to many people the Navy's policy did not seem so unwise, but that is where Justice Kennedy started. Justice Kennedy then spent a lot of time in *Beller* outlining his understanding of the limits of the judicial role. (As an aside, I note that from my reading of the set of opinions I am discussing, Justice Kennedy seemed to run hot and cold as to the importance of a limited judicial role. Sometimes he was very concerned with describing such limits, and other times, as I will explain in a bit, he emphasized that the judiciary must step in when there is a political stalemate or incursions on the judiciary.)

Justice Kennedy also stated in *Beller*, again while upholding the Navy's gay exclusion policy, that "we can concede . . . that the reasons which led the Court to protect certain private decisions intimately linked with one's personality and family living arrangements beyond the core nuclear family suggest that some kinds of government regulation of private consensual homosexual behavior may face substantial constitutional challenge."[45] He went on to say that, here, the state did not "seek[] to use its criminal processes to coerce persons to comply with a moral precept even if they are consenting adults acting in private without injury to each other,"[46]—that is, the facts of the *Lawrence* case.[47] So all the seeds of *Lawrence* are quite evident in *Beller*, even though, in the end, *Beller* says, essentially, because it's a military policy, we are going to approve the ban on gays.[48]

Beller is additionally another opinion in which Justice Kennedy's observation that it's hard to understand the present has resonance. Justice

38. 632 F.2d 788 (9th Cir. 1980), *overruled by*, Witt v. Dep't of the Air Force, 527 F.3d 806, 819 (9th Cir. 2008).

39. *Id.* at 792.

40. 517 U.S. 620 (1996).

41. 539 U.S. 558 (2003).

42. 570 U.S. 744 (2013).

43. 135 S. Ct. 2584 (2015).

44. 632 F.2d at 792.

45. *Id.* at 810 (citing Roe v. Wade, 410 U.S. 113 (1973); Zablocki v. Redhail, 434 U.S. 374 (1978)).

46. *Beller*, 632 F.2d at 810.

47. Lawrence v. Texas, 539 U.S. 558, 569 (2003).

48. *Beller*, 632 F.2d at 812.

Kennedy said in *Beller* that the Navy's concerns have a "basis in fact."[49] What were those concerns? They're articulated as, first, "tensions and hostilities" that will arise from allowing gays to serve in the Navy because the great majority of naval personnel "despise/detest homosexuality,"[50] and, second, that there's going to be an adverse impact on recruiting, because parents will not want their children "associating with individuals who are incapable of maintaining high moral standards."[51] After stating that these concerns have a "basis in fact,"[52] the opinion looped back, opining that "[u]pholding the challenged regulations as constitutional is distinct from a statement that they are wise. . . . It should be plain from our opinion that the constitutionality of the regulations stems from the needs of the military."[53]

This back-and-forth drafting looks like the beginning of an internal struggle within Justice Kennedy as to the issue of gay rights and the constitutional doctrines applicable to address them. *Beller* even had some discussion of the levels of scrutiny applicable to this kind of discrimination.[54] So the *Beller* opinion is a forerunner of the recurring tension in Justice Kennedy's jurisprudence between upholding personal liberty and observing a constrained role of the court *vis-à-vis* other governmental institutions.

Next up is *Chadha v. INS*.[55] The Ninth Circuit's decision in *Chadha*, a lengthy and scholarly opinion by Justice Kennedy, was upheld in the *Chadha* Supreme Court opinion in which Chief Justice Burger wrote, over only one dissent (by Justice White), that a unicameral congressional veto is unconstitutional.[56] *Chadha* concerned a statute that provided that whenever the immigration court provided an exception to deportation for hardship, the ruling had to be sent to Congress, and either house could veto it.[57] So *Chadha* concerned a unicameral, purely congressional decision reversing an administrative adjudication. The Supreme Court opinion by Chief Justice Burger focuses exclusively on the interference with bicameralism and with the role of the president.[58]

Justice Kennedy's opinion for the Ninth Circuit in *Chadha* is, in my view, much more interesting than Justice Burger's later version, although the result was the same. Justice Kennedy's *Chadha* opinion was a lengthy exegesis on the importance of the separation of powers within the federal government. The opinion cites Madison, Jefferson, Adams, Montesquieu, and seemingly, every

49. *Id.* at 811.
50. *Id.*
51. *Id*. at 811 n.22.
52. *Id*. at 812 ("These considerations are adequate to sustain the regulation in its military context.").
53. *Id*.
54. *Id*. at 807.
55. 634 F.2d 408 (9th Cir. 1980), *aff'd sub nom.*, 462 U.S. 919 (1983).
56. 462 U.S. at 944–59.
57. *Id.* at 923–24.
58. *See generally id.*

other pre-twentieth century eminence one can think of.[59] There were long quotes from the Federalist Papers, to underscore that the goal of preventing the undue concentration of power is to protect against dangers to liberty.[60] This emphasis on the connection between both federalism and separation of powers within the federal government on the one hand, and protecting individual liberty on the other, became a recurring Kennedy theme. Justice Kennedy also wrote in *Chadha* that the judiciary is the key governmental mechanism for avoiding stalemates.[61] He said that one possibility would be for the judiciary to suggest that the executive branch stop the Congress from exceeding its authority, but, said Justice Kennedy in his Ninth Circuit *Chadha* opinion, that's not what we do. Instead, questions of separation of powers go to the judiciary, and the judiciary decides which of the other two branches should prevail. What's notable is the ambition of the Kennedy *Chadha* opinion—it reads like an application to be a Supreme Court Justice. The Supreme Court affirmance was much more modest (even though it was accused by the dissent of being too expansive[62]).

Where are the echoes of the Ninth Circuit *Chadha* opinion in Justice Kennedy's Supreme Court jurisprudence? Perhaps in *Bush v. Gore*'s[63] notion that the judiciary sometimes just has to take over—that is, the belief that at some point, the courts have no choice but to step in to readjust the political system. But in *Bush v. Gore*, unlike in *Chadha*, there were other obvious possibilities, as the various dissents indicated.

Finally, *Graham v. Commissioner of Internal Revenue*[64] was a Free Exercise clause opinion demonstrating how much Free Exercise and Establishment Clause law has moved since the 1980s, and Justice Kennedy with it. Several members of the Church of Scientology challenged on the basis of the Free Exercise and Establishment clauses the refusal of the IRS to allow them to take charitable deductions for the way in which they provided money to the Church of Scientology.[65] Scientology members are charged a fixed donation for training and "auditing" required by the church.[66] Because there was a quid pro quo for the contributions to the church, the payments did not qualify as charitable contributions.[67]

The plaintiffs in *Graham* insisted that the doctrine of exchange was part of their religion.[68] Justice Kennedy's opinion at first took issue with that assertion,

59. 634 F.2d at 421.
60. *See, e.g.*, *id.* at 434.
61. *Id.* at 423.
62. *Chada*, 462 U.S. at 983 (White, J., dissenting).
63. 531 U.S. 98 (2000).
64. 822 F.2d 844 (9th Cir. 1987).
65. *Id.* at 846–48.
66. *Id.* at 847.
67. *Id.* at 848.
68. "One of the tenets of Scientology is that any time a person receives something, he must pay something back. This is called the doctrine of exchange." *Id.* at 847.

saying he didn't think there was any prohibition on their actually giving donations.[69] But aside from that, *Graham* said, even if these transactions are central to the practice of their scientologists' religion, the government interest in a neutral and enforceable taxation system is compelling and outweighs any burden on religious beliefs.[70] *Graham* stressed, in particular, the cost of creating exemptions for taxes.[71]

Justice Kennedy in *Graham* seems to take a much narrower view of the freedom of religion than, for example, *Burwell v. Hobby Lobby Stores, Inc.*[72] suggested more recently, indicating a shift in his position regarding the preeminence of religious objectors' interests. Perhaps that shift may reflect the ascendance of evangelical religion as a political and social force, leading to fervent Supreme Court advocacy for religious exceptions to governmental regulation.

That review of some of Justice Kennedy's opinions when he was Judge Kennedy completes my archaeological project. I have not discussed Ninth Circuit opinions dealing with economic and commercial issues, as Justice Kennedy's views on those issues have been both more consistent—usually favoring business litigants—and less interesting. The last opinion I want to discuss is *Martinez v. Ryan*.[73]

Martinez was something of a tour de force. The prior law had held that there is no constitutional right to representation by counsel in post-conviction review proceedings.[74] Because there is no such constitutional right, the ineffectiveness of a lawyer in state post-conviction review proceedings is ordinarily not a ground for excusing a procedural default. In other words, if the state post-conviction review lawyer doesn't raise an issue not litigated on appeal, there is a procedural default and the prisoner cannot raise the issue on federal habeas.

When *Martinez* was argued in the Supreme Court, the lawyers accepted this framework but argued that there *was* some limited constitutional right to lawyers in state post-conviction review proceedings—where that review was the first time that the petitioner could raise ineffective assistance in the trial court. What is so interesting about *Martinez* is that Justice Kennedy's opinion walked away from the framework presented by the parties. The opinion did not decide that there is a constitutional right to lawyers in post-conviction review proceedings. Instead, the opinion held as an equitable matter that a petitioner gets at least one shot at an ineffective assistance claim regarding the trial. So it's not a procedural default for federal habeas purposes if trial counsel's

69. *Id.* at 850.
70. *Id*. at 853.
71. *Id*.
72. 537 U.S. 682 (2014).
73. 566 U.S. 1 (2012).
74. *Id.* at 8 (citing Coleman v. Thompson, 501 U.S. 722 (1991)).

ineffectiveness was not raised because post-conviction counsel was ineffective.[75] But a petitioner doesn't have a constitutional right to have a post-conviction lawyer.[76] Whether Justice Kennedy invented this compromise position up or where exactly it came from, I don't know. As I read the oral argument in *Martinez*, no party presented the problem in the case that way.[77]

Justice Kennedy may have completely underestimated, though, how often and to what degree the *Martinez* rule would impact the litigation of capital cases. *Martinez* comes up before the Ninth Circuit in half the capital habeas cases we have, it seems. And applying *Martinez* in diverse situations has proved something of a challenge, dividing our court repeatedly.[78]

Martinez provides some additional keys to Justice Kennedy's jurisprudential tendencies. First of all, Justice Kennedy wasn't always enamored of procedural technicalities. The notion that criminal defendants whose lawyers had failed them should be *heard* in court was important enough to him to justify the creation of an innovative doctrine. Secondly, at the bottom of the problem in *Martinez* is an appreciation of the importance of lawyers—a criminal defendant should have at least one shot at a competent lawyer. I think that theme—that effective lawyering is essential to competent judicial decision-making—is one that resonates as well.

I am reminded, in that connection, of a recurring conversation between Justice Kennedy and my husband Stephen Berzon at the Ninth Circuit's annual conferences (which Justice Kennedy faithfully attends). Each year, Justice Kennedy would ask Stephen whether he is still a practicing lawyer. And each year, when Stephen said yes, Justice Kennedy would say that practicing law in California was the best job he ever had. Perhaps that affection for the practice of law—for the need to connect with diverse clients and creatively represent their interests—explains some of the traits my archaeology has uncovered—including the effort to peek, albeit tentatively and cautiously, outside the "present" in which we are all captive.

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75. *Id.* at 14, 17–18.

76. *Id.* at 16; *see also id.* at 18 (Scalia, J., dissenting).

77. *See generally* Transcript of Oral Argument, Martinez v. Ryan, 566 U.S. 1 (2012) (No. 10-1001).

78. *See, e.g.*, Detrich v. Ryan, 740 F.3d 1237 (9th Cir. 2013) (en banc) (four separate opinions interpreting *Martinez*, none of which commanded a majority of the eleven judge panel); Dickens v. Ryan, 740 F.3d 1302 (9th Cir. 2014) (en banc) (considering *Martinez* with five separate opinions). A later Ninth Circuit decision described the fractured *Detrich* opinions, noting that "[a]n opinion by Judge W. Fletcher announced the judgment, but that opinion was joined in full by only two other judges (Judges Pregerson and Reinhardt). Another judge (Judge Christen) concurred in section II of Judge Fletcher's opinion and also the result. Judges Nguyen and Watford each concurred in the result, and each wrote a separate opinion. Judge Graber authored a dissent, joined in full by four other judges (Chief Judge Kozinski and Judges Gould, Bea, and Murguia)." Clabourne v. Ryan, 745 F.3d 362, 375 (9th Cir. 2014), *overruled by*, McKinney v. Ryan, 813 F.3d 798 (9th Cir. 2015) (en banc).